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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MARIUSZ KACZMARCZYK, JOZEF CZAJKOWSKI, and TADEUSZ KUSPER,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the §556(e) of the Administrative Procedure Act, 5 U.S.C. §556(e), applies to asylum proceedings under the Immigration and Nationality Act.

(2) Whether the Board of Immigration Appeals can consider evidentiary matters outside the administrative record when reviewing and denying applications for political asylum.

(3) Whether the petitioners were denied their constitutional rights to procedural due process of law when the Board of Immigration Appeals denied their political asylum applications based upon evidentiary matters outside the administrative record.

(4) Whether the court of appeals has the authority to review and grant voluntary departure when judicially reviewing asylum claims.

PARTIES TO THE PROCEEDINGS

1. The petitioners are Mariusz Kaczmarczyk, Jozef Czajkowski and Tadeusz Kusper. These individuals had filed petitions for review in the Seventh Circuit Court of Appeals seeking review of certain orders of the Immigration and Naturalization Service.

2. The respondent, Immigration and Naturalization Service is an agency of the United States Government.

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MARIUSZ KACZMARCZYK, JOZEF CZAJKOWSKI, and TADEUSZ KUSPER,

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IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Mariusz Kaczmarczyk, Jozef Czajkowski and Tadeusz Kusper petition for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The Decision of the United States Court of Appeals for the Seventh Circuit was entered on May 31, 1991 and appears at p. 1 of the Appendix to this Petition. It is reported at 933 F.2d 588. No petition for rehearing was filed

in the United States Court of Appeals for the Seventh Circuit.

The decision of the Board of Immigration Appeals, Immigration and Naturalization Service, (hereinafter BIA), denying political asylum in the case of petitioner Kaczmarczyk was rendered on April 6, 1990 and is set out on page 19 of the Appendix. The BIA decision denying petitioner Czajkowski's asylum claim was entered on April 17, 1990 and appears at page 22 of the Appendix. The denial of the asylum claim of petitioner Kusper by the BIA was rendered June 6, 1990 and is set out at page 27 of the Appendix.

JURISDICTION

The Judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 31, 1991. This Petition is filed within ninety (90) days of the entry of the judgment, as permitted by Supreme Court Rule 20. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Circuit Court of Appeals had jurisdiction under 8 U.S.C. §1105a(a).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty or property without due process of law . . ."

STATUTORY PROVISIONS

Section 101(a)(42), of the Immigration and Nationality Act, 8 U.S.C. §1101(a)(42), provides:

> (42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

Section 556(e) of the Administrative Procedure Act, 5 U.S.C. §556(e), provides:

> (e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision

rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

STATEMENT OF THE CASE

The petitioners, Mariusz Kaczmarczyk, Jozef Czajkowski and Tadeusz Kusper are citizens and nationals of Poland who filed applications for political asylum. Each application for asylum was denied by the immigration court in Chicago, Illinois. The petitioners then appealed to the Board of Immigration Appeals.

The BIA, upon review, denied the applications for asylum and dismissed the appeals. In each case the BIA predicated its rulings, either in whole or in part, on the following determination:

> "The Board takes administrative notice that effective September 10, 1989, the Solidarity organization formally entered into the coalition government that is presently governing Poland. Given that Solidarity is now part of the coalition governing Poland, there no longer exists any basis for the respondent's claim that he has a well-founded fear of persecution by the Polish government due to his association with Solidarity."

The petitioners were then ordered to voluntarily depart the United States within 30 days or be deported.

Each petitioner filed a timely petition for review with this Court of Appeals for the Seventh Circuit, contending that the BIA's decisions were not in accordance with the law, based upon information not in the record which oc-

curred after their appeals to the BIA had been filed and as to that non-record information, the petitioners were not given any notice and opportunity to refute. The petitioners moved to consolidate their petitions for review and the Court of Appeals granted that motion on July 26, 1990.

On appeal, the Seventh Circuit affirmed the decisions of the Board of Immigration Appeals in all three cases. The Court held that the BIA could properly take notice of facts not in the record relating to a change in the Polish government on September 10, 1989 and the resulting fact that the petitioners would no longer have a well-founded fear of persecution. The Court concluded that the BIA may take official notice of uncontroverted facts concerning political conditions in asylum seekers' home countries, when reviewing asylum claims.

The Court rejected the petitioners' argument that §556(e) of the Administrative Procedure Act ("APA"), 5 U.S.C. §556(e), should have been applied so as to allow the petitioners an opportunity to rebut the facts of which the BIA planned to take official notice of. The Court held that as in proceedings involving deportation, the APA's procedural entitlement are not applicable to political asylum proceedings under the Immigration and Nationality Act.

As to the petitioners' argument concerning the violation of their right to procedural due process of law when the BIA takes official notice of evidentiary matters outside the administrative record, the Seventh Circuit ruled that petitioners do have a constitutional right to respond to such facts. However, according to the Court, the petitioners could exercise that right after the BIA had ruled by filing a motion to reopen under 8 C.F.R. §3.2. The mechanism, according to the Court, provides sufficient due process protections.

After affirming the asylum denials, the Seventh Circuit then addressed the petitioners' request to reinstate voluntary departure of 60 days. The Court concluded that there was no authority to reinstate voluntary departure in petition for review proceedings.

REASONS FOR GRANTING THE WRIT

I.

This case involves important issues of law concerning the decisions of the Board of Immigration Appeals in reviewing and adjudicating claims for political asylum under §208(a) of the Immigration and Nationality Act, 8 U.S.C. §1158(a). Under that provision, the establishment of persecution or a well-founded fear of persecution governs the Attorney General's determination as to whether an alien is eligible for a grant of asylum. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 94 L.Ed.2d 434 at 445 (1987). The utilization of this "well-founded fear" standard would indicate that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility. *INS v. Stevic*, 467 U.S. 407, at 424-425 81 L.Ed.2d 321 (1984). Since there is ambiguity in the term "well-founded fear", asylum determinations under that provision can only be made on a case-by-case determination. *Cardoza-Fonseca*, 480 U.S. at 444.

In each of these three cases, the BIA went outside the record and determined that the asylum applications should be denied based upon events that took place subsequent

to the evidentiary hearings and subsequent to the petitioners filing appeals to the BIA. Each asylum denial by the BIA was predicated upon the following finding which considered events and facts not found in the administrative record:

> "The Board takes administrative notice that effective September 10, 1989, the Solidarity organization formally entered into the coalition government that is presently governing Poland. Given that Solidarity is now part of the coalition governing Poland, there no longer exists any basis for the respondent's claim that he has a well-founded fear of persecution by the Polish government due to his association with Solidarity."

It is the petitioners' contention that in order to utilize the concept of "official notice" or "administrative notice" the provisions of the APA must be taken into account.

The Administrative Procedure Act allows an administrative agency to take "official notice" of certain materials or evidentiary matters not appearing in the evidence portion of the administrative record. 5 U.S.C. §556(e). Official notice, like judicial notice, allows the adjudicator to take notice of commonly acknowledged facts. See *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 530 (1946). The doctrine of "official notice" also allows an administrative agency to take notice of technical or scientific facts that are within the agency's area of expertise. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953). However, the concept of official notice has its limitations. While an agency can take official notice of facts having relatively wide knowledge consisting of general propositions, the agency cannot take notice of evidentiary material or adjudicative facts. See, *Warmoth v. Bowen*, 798 F.2d 1109 (7th Cir. 1986); *Little v. Califano*, 462 F.Supp. 575 (W.D. N.C. 1978). Administrative agencies are not privileged to take

judicial notice of evidentiary material which is not a matter of common knowledge, since to do so denies the affected party the fundamentals of a fair hearing. *Glendenning v. Ribicoff*, 213 F.Supp. 301 (D.C. Mo. 1962). As with judicial notice, an agency's utilization of official notice should only apply to facts that are verifiable with certainty. See *e.g.*, *Rowland v. Tarr*, 480 F.2d 545 (3rd Cir. 1973). The procedures utilized by the BIA here—taking official notice of subsequent political changes poses both factual and legal problems. If the decision stands, the BIA is in a position to determine asylum claims not upon what is contained in the administrative record, but what the Board members read in the newspapers or see on television. The use of official notice in such instances to deny asylum applications is contrary to the individualized adjudication of such claims under *Cardoza-Fonseca*. 480 U.S. at 444. The BIA's determination that it can take notice that no one fears persecution from a particular country (in this case Poland), amounts to an across the board denial of asylum claims without evidentiary basis in the record.

In this case the Court of Appeals for the Seventh Circuit held that the §556(e) of the APA does not apply to asylum proceedings. This determination would appear to be at odds with two other Circuits. See, *McLeod v. INS*, 802 F.2d 89 (3rd Cir. 1986) and *Escobar Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988). In reaching its determination here the Seventh Circuit relied upon *Marcello v. Bonds*, 349 U.S. 302, 99 L.Ed. 1107 (1955), which only held that the provisions of the APA were inapplicable to a deportation proceeding. In *Marcello v. Bonds*, this Court examined the relationship between the Immigration and Nationality Act and the APA and concluded that when Congress drafted the hearing provisions of the Immigration Act, it used the APA only as a model and the depor-

tation procedures under the INA would be the sole and exclusive procedure for determining deportation. *Marcello*, 349 U.S. at 308-09. Outside the context of a deportation proceeding, itself, this Court has held that the APA does have application in immigration proceedings. See, *Shaughnessy v. Pedreiro*, 349 U.S. 48, 99 L.Ed. 868 (1955).

The statutory provisions governing asylum (8 U.S.C. §1158(a)) and deportation (8 U.S.C. §1252) are separate and distinct. Different standards and procedures are used in each proceeding. Review in this case is necessary to determine the applicability of the APA to immigration proceedings outside the context of a deportation hearing and to resolve the conflict in the circuits between this case and *McLeod* and *Escobar Ruiz*, *supra*.

II.

It is also necessary that the Court should review this case in order to establish the parameters as to when the BIA can even use the concept of official notice in asylum proceedings. The Board has taken official or administrative notice of two distinct factual matters: (1) that effective September 10, 1989, the Solidarity organization entered into a coalition government in Poland, (2) because of this coalition government, the petitioners no longer have well founded fear of persecution. Taking official notice of both of these facts was erroneous, especially the second determination that because of a coalition government in Poland, no-one has a well-founded fear of persecution in that country. The BIA's use of official notice to deny these asylum applications is contrary to the individualized adjudication of asylum claims amounts to evidentiary adjudication by ex parte decision-making. While the Seventh Circuit terms it reasonable to conclude that political circumstances in Poland diminished the likelihood that there is no longer

a well-founded fear of persecution, these petitioners have no opportunity to rebut the evidence used against them, nor do they even know how the BIA garnered the information that it used to determine the facts that it officially noticed.

In this case, the petitioners were never provided with the opportunity to rebut or confront the "official notice" taken by the BIA that Poles no longer have a well-founded fear of persecution in Poland because of a change in government. What the BIA should have done here was remand these cases back to an immigration judge so that a complete evidentiary record could be established on the issue of political change in Poland. The petitioners would then have had the opportunity to present evidence on this crucial aspect of their asylum claims. Failure to review this case will allow the BIA to make asylum decisions based upon unrebuttable, non-record evidence. This is not what Congress intended when §101(a)(42) of the INA, 8 U.S.C. §1101(a)(42)(A), was enacted.

III.

The adjudication of the petitioner's asylum claims utilizing "official notice" of evidentiary facts also denied the petitioners their constitutional right to procedural due process of law. Constitutional due process requires that a party be given an opportunity to present his case and have its merits fairly judged. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433, 71 L.Ed.2d 265 (1982). An alien has a Fifth Amendment procedural due process right to petition the government for political asylum. *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1036 (5th Cir. 1982). Congress has set minimum requirements for statutory due process in immigration hearings under subsection 242(b) of the Immigration and Nationality Act, 8 U.S.C. §1252(b).

Maldonado-Perez v. INS, 865 F.2d 328 (D.C. Cir. 1989). In order to prevail on a due process claim, an alien must produce some concrete evidence indicating that the violation of procedural due process had the *potential* for affecting the outcome of the deportation proceedings. *Shahandeh-Pey v. INS*, 831 F.2d 1384, 1389 (7th Cir. 1987); *United States v. Cerda-Pena*, 799 F.2d 1374, 1379 (9th Cir. 1986).

The Circuit Court agreed that the petitioners were entitled to notice and opportunity to be heard here. However, the Court held that such notice and opportunity need not be accorded until after the BIA has taken official notice and denied the claims for asylum. The petitioners here cannot be accorded meaningful due process protections unless notice and opportunity to respond are accorded prior to their asylum claim being adjudicated. *Board of Regents v. Roth*, 408 U.S. 564 at 570-571, 33 L.Ed.2d 458 (1972). Due process in the context of an asylum claim should mean that the applicant cannot be denied his application without first allowing him an opportunity to present his claim of entitlement. See *e.g.*, *Bell v. Burson*, 402 U.S. 553 at 541, 29 L.Ed.2d 90 (1971).

The Seventh Circuit decision here only accords procedural due process protections to asylum applicants after their claims have been denied. The Court erroneously reasoned that INS regulations allowing an applicant to file a motion to reopen provides asylum claimants with sufficient constitutional protections. There are a number of problems with this holding. A motion to reopen or reconsider does not serve to stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of deportation is specifically granted by the Board or the officer of the Service having administrative jurisdiction over the case. [8 CFR §3.8(a)]. The petitioners would be at the mercy of the Immigration and

Naturalization Service while the Board pondered their requests. The Board took from 26 to 21 months to prepare the transcript and make a decision in each case. It is doubtful that the INS would allow aliens to stay in the United States while their motions to reopen were considered by the Board. The Immigration and Naturalization Service in Chicago has issued warrants for the deportation for individuals to whom the Board has granted voluntary departure and for which petitions for review have been filed. It is not likely that the petitioners would have remained in the United States if such motions had been filed. Second, the standards that apply to motions to reopen are much more stringent than the standard to be utilized in an asylum application. See *INS v. Abudu*, 485 U.S. 94, 99 L.Ed.2d 90 (1985). By implementing "official notice" in asylum claims the BIA is able to deprive asylum applicants of substantial procedural rights.

IV.

The Seventh Circuit's refusal to reinstate voluntary departure in this case puts a chilling effect on the filing of petitions for review in immigration proceedings and this Court should review this aspect of the case as well. If the reviewing court cannot or will not reinstate voluntary departure, such action will have a chilling effect on all petitions for review. If a petition for review is denied, the alien is subject to immediate deportation. The Seventh Circuit's refusal to reinstate voluntary departure in this case is contrary to a number of other Circuit decisions. *Benitez-Mendez v. INS*, 760 F.2d 907 (9th Cir. 1985); *Ballenella-Gonzalez v. INS*, 546 F.2d 515 (2d Cir. 1976); *De Reynosa v. INS*, 627 F.2d 958 (9th Cir. 1980).

CONCLUSION

The Petition for Writ of Certiorari should be granted and the Judgment below should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 90-1964, 90-2070, 90-2412

MARIUSZ KACZMARCZYK, *et al.*,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Appeal from Three Orders of the
Board of Immigration Appeals.
Nos. A28 474 767, A27 896 113, A27 894 952

ARGUED JANUARY 29, 1991—DECIDED MAY 31, 1991

Before WOOD, JR., FLAUM, and MANION, *Circuit Judges.*

FLAUM, *Circuit Judge.* The petitioners in this consolidated appeal challenge the decision of the Board of Immigration Appeals to take notice of changed political circumstances and the resulting decrease in likelihood of persecution in their native country in the course of ruling on their applications for political asylum and withholding of deportation. We hold below that the Board may properly take official notice of such facts, but that asylum petitioners are entitled to an opportunity to respond. Established Board of Immigration Appeals procedures, we conclude, can be construed to allow petitioners adequate rebuttal opportunity.

I.

The petitioners are Polish citizens who were ordered by the Immigration and Naturalization Service ("INS") to show cause why they were not deportable under § 241(a)(2) of the Immigration and Naturalization Act ("Act"), 8 U.S.C. § 1251(a)(2). Each petitioner admitted deportability but sought political asylum and withholding of deportation under sections 208 and 243(h) of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1158, 1253(h). All three received hearings before an Immigration Judge ("IJ"); in each case the petitioner's application for asylum and withholding of deportation was denied. All three appealed to the Board of Immigration Appeals ("BIA").

The BIA affirmed the IJ's determination in each case, noting that each petitioner had based his application on membership in or association with the Polish political organization Solidarity. In each case, the Board took administrative notice of the fact that because, beginning in September 1989, Solidarity joined with the Communist Party in a coalition government ruling Poland, its members were no longer being persecuted by Polish authorities for their organizational affiliation. Based on this fact and a review of the record in each case, the BIA concluded that none of the three petitioners proved that they had a "well-founded fear" of persecution upon return to Poland. 8 U.S.C. §§ 1101(a)(42)(A), 1158(a). Thus, the BIA affirmed the IJ's decision in each case and granted each petitioner a 30-day period of voluntary departure. The petitioners appeal the BIA's decisions.

A. Mariusz Kaczmarczyk

Kaczmarczyk's asylum application and testimony indicated that he joined a pro-Solidarity student organization in 1980. From 1981 to 1983 he participated in anti-government protests in Krakow, Poland. Kaczmarczyk related that he was beaten by police during some of these demonstrations. He also testified that while he was never formally arrested or indicted by Polish authorities, he was on a number of occasions stopped by police and detained for several hours.

Upon arrival in the United States in December 1984, Kaczmarczyk joined an American organization opposed to the communist government then ruling Poland.

Kaczmarczyk also testified that since arriving in the United States, he learned from a friend who was interrogated by the Polish police that Polish authorities have identified him as an anti-government activist. Finally, he testified that his parents, who remain in Poland, informed him that the Polish police had inquired about his whereabouts.

After a hearing, an IJ found that Kaczmarczyk had failed to prove either past persecution or a well-founded fear of future persecution, and consequently denied his asylum application. The IJ stated that Kaczmarczyk had not demonstrated that Polish authorities were aware of his activities or were inclined to punish him. Kaczmarczyk was granted a 90-day period of voluntary departure.

Kaczmarczyk appealed to the BIA, which on April 6, 1990 affirmed the IJ's decision. The BIA reasoned that in light of current political circumstances in Poland, Kaczmarczyk could not harbor a well-founded fear of persecution arising from his support of or membership in Solidarity. The BIA granted Kaczmarczyk a 30-day period of voluntary departure beginning April 6, 1990.

B. Jozef Czajkowski

Czajkowski's asylum application and deportation hearing testimony demonstrated that he had been a member of the Polish army from 1968 to 1970 and that he has a wife and two children who remain in Poland. He testified that in 1980 he joined a Solidarity unit at his workplace. Czajkowski stated that as a member of his unit's leadership, he participated in Solidarity meetings and distributed the organization's literature.

Czajkowski testified that after martial law was declared in December 1981, he was arrested, detained, and forced to sign a pledge that he would cease Solidarity activities. He nevertheless continued to distribute Solidarity literature and was detained once again in 1982. Czajkowski was

then sent to Iraq for two years to work on a road construction project. Upon his return to Poland in 1984, he resumed work at his state-owned former place of employment. Czajkowski continued to work there until he left for the United States in November 1985. He was fired from his position only after he failed to return after a year's leave of absence.

In 1987, Czajkowski's wife wrote him that since his departure, the police had searched their house on numerous occasions. She wrote that she was fined by the police for possessing Solidarity literature and that other Solidarity members also continued to be harassed by Polish authorities. Finally, Czajkowski testified that he continued his political activities in the United States as a member of an American organization opposed to the communist rule of Poland.

After conducting a hearing, an IJ concluded that Czajkowski had failed to show that he possessed a well-founded fear of persecution and denied his application for asylum. The IJ based this conclusion on the fact that Czajkowski had been permitted to leave Poland to work in Iraq for two years, had returned to his former job upon his return from Iraq, and was not dismissed from that job until he failed to return from the United States. The IJ granted Czajkowski a 90-day period of voluntary departure.

Czajkowski appealed to the BIA. On April 17, 1990 the BIA concluded that Czajkowski had failed to show past persecution or a basis for a well-founded fear of persecution and affirmed the IJ's ruling. In Czajkowski's case, too, the Board took notice of the fact that as a result of a change in government, Polish citizens, as a general matter, were no longer being persecuted by the Polish government for their involvment in Solidarity. The BIA granted Czajkowski a 30-day period of voluntary departure to commence upon the issuance of its decision.

C. Tadeusz Kusper

In his application for asylum and in testimony at his deportation hearing, Kusper indicated that he had been

an early member of Solidarity. He explained that he had participated in meetings and strikes sponsored by the organization and in retaliation was denied benefits and raises at his place of employment. He testified that in 1982 he was arrested and held by the police for 24 hours; afterwards, the police harassed him with threatening telephone calls and visited his home. Kusper also testified that it took him more than two years to obtain a passport (he finally left Poland in October 1985) and that during that period he was frequently required to report to the police.

After a hearing, an IJ found that Kusper had not proven that he qualified as a refugee and was therefore ineligible for political asylum. The IJ based his conclusions on the vagueness of Kusper's testimony and his failure to substantiate either past persecution or a well-founded fear of future persecution. The IJ granted Kusper a 60-day period of voluntary departure. Kusper then appealed to the BIA, which on June 6, 1990, denied his appeal. In reaching its decision, the BIA noted that all of the events Kusper relied upon to substantiate his fear of persecution occurred before 1986, and that since then, political changes in Poland rendered his fear of future persecution unreasonable. The Board granted Kusper a 30-day period of voluntary departure to commence upon the issuance of its decision.

The petitioners appeal from the decisions of the BIA and seek both asylum and withholding of deportation.[1]

II.

Petitioners raise several claims on appeal. First, they object to the BIA's taking official notice that the composition of the Polish Government had changed and that the like-

[1] Petitioners acknowledge that their burden of proof to establish eligibility for political asylum is lower than that to avoid deportation under the withholding provisions of the INA. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 443-45 (1987). They concede that, should this court uphold the BIA's determination that they are ineligible for political asylum, we need not reach the issue of whether they qualify for withholding of deportation.

lihood that Solidarity supporters would be persecuted by the Polish government had thus decreased or disappeared. They contend that the Board's notice was inappropriate and unauthorized and that they were denied the opportunity to dispute the noticed facts in violation of their due process rights under the fifth amendment. The petitioners further argue that the Board improperly predicated its denials of their asylum applications solely on the changed political circumstances in Poland, and failed to consider other evidence they presented regarded their fear of future persecution in Poland. Finally, should we conclude that the preceding arguments have no merit, the petitioners request that we extend their period of voluntary departure by 60 days.

A. Standard of Review

Political asylum procedures involve two steps. In the first step, an alien must demonstrate that she meets the statutory definition of refugee;[2] this is a factual determination. If the applicant succeeds in this regard, the Attorney General may, then, in his discretion, grant the applicant's asylum petition. *See Carvajal-Muñoz v. INS*, 743 F.2d 562, 567 (7th Cir. 1984). We apply different standards of review to the BIA's factual findings and legal conclusions. We review the Board's factual findings under a substantial evidence standard. *Id.* at 1259. This requires that its conclusions be "substantially reasonable." *Balazoski v. INS*, No. 89-3640, slip op. at 4 (7th Cir. 1991); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1001 (9th Cir. 1988). Review of the BIA's legal conclusions and interpretations of the INA, by contrast, is *de novo*. *Zalega v. INS*, 916 F.2d 1257, 1259 (7th Cir. 1990). Finally, the Attorney General's discretionary decision to deny political asylum to a statutorily eligible

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[2] Under the INA, a "refugee" is a person who is unable or unwilling to return to her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *See* 8 U.S.C. § 1101(a)(42)(A).

alien is reviewed under an arbitrary and capricious standard. *Shahandeh-Pey v. INS*, 831 F.2d 1384, 1387 (7th Cir. 1987).

B. Official Notice

The petitioners mount two attacks on the Board's decision to take official notice of political changes in Poland.[3] First, they contend that the notice taken by the Board was impermissibly broad; they argue that official notice of Solidarity's participation in the ruling coalition government in Poland and the resulting decline in government persecution of Solidarity supporters together "amounts to an across-the-board denial of all Polish asylum claims." Petitioner's Brief at 19. The petitioners argue that such use of official notice robs asylum adjudications of their individualized nature and in fact caused the Board in their cases to ignore evidence they presented regarding the possibility that they will be persecuted upon their return to Poland.

We believe that the Board's authority to take official notice—authority which the petitioners, as a general matter, do not dispute—is broad enough to encompass the notice taken in this case. In exercising official notice, administrative agencies may consider commonly acknowledged facts. *See generally*, 3 K. Davis, ADMINISTRATIVE LAW TREATISE § 15 (1980). The Board's notice of current events bearing on an applicant's well-founded fear of persecution—in this case Solidarity's participation in the Polish government—falls within this accepted category. *See McLeod v.*

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[3] In its review of each of the petitioners' applications, the Board stated:

> The Board takes administrative notice that effective September 10, 1989, the Solidarity organization formally entered into the coalition government that is presently governing Poland. Given the fact that Solidarity is now part of the coalition governing Poland, there no longer exists any basis for the respondent's claim that he has a well-founded fear of persecution by the Polish government due to his association with Solidarity.

INS, 802 F.2d 89, 93 n.4 (3rd Cir. 1986); *Zamora v. INS*, 534 F.2d 1055, 1062 (2d Cir. 1976) ("The attitude of the country of prospective deportation toward various types of former residents is a question of legislative fact" amenable to administrative notice) (Friendly, J.); 4 J. Stein, ADMINISTRATIVE LAW, § 25.01 (1986). Indeed, in a case much like the ones before us today, we recently recognized the BIA's authority to take notice of changed political circumstances. In *Kubon v. INS*, 913 F.2d 386, 388 (7th Cir. 1990), this court concluded that the BIA properly took official notice of Solidarity's participation in the coalition government then ruling Poland. We reiterate today that the BIA may take official notice of uncontroverted facts concerning political conditions in asylum seekers' home countries, including Solidarity's role in the Polish government.

Of course, the BIA took notice not only of the fact that political circumstances have changed in Poland, but that they have changed in such a way as to render unsupportable the petitioners' fears of future persecution. It is this inference that leads petitioners to protest that the notice taken by the Board will result in the uniform denial of all future Polish asylum claims. The fact that such a result might follow, however, is not sufficient reason to condemn the Board's actions in this case. Congress has mandated that only those aliens who have suffered past persecution or have a well-founded fear of future persecution may be granted asylum. To the extent that the BIA was correct in concluding that a Polish asylum applicant's fear of persecution should have evaporated—as an objective matter, at least—in the face of Poland's changed political circumstances, the applicant's quarrel is with Congress for directing that such an analysis take place, not the Board. The question that immediately presents itself, then, is whether the conclusion drawn by the BIA is a reasonable one, one that can be characterized as "commonly acknowledged."

We believe it was reasonable for the Board to conclude that Poland's changed political circumstances substantial-

ly diminished the likelihood that the Polish government would persecute Solidarity members and activists. This conclusion was supported by advisory opinions from the Department of State issued in response to each of the petitioners' applications, and we give considerable weight to that Department's opinion in matters concerning international affairs, its area of expertise. Moreover, the Board's judgment seems to comport with common sense. Governments are not likely to persecute their political supporters, particularly those like the petitioners who stood with them when to do so was to assume significant personal risk. In their brief before this court, the petitioners observed that the Communist Party continued to control the military and the police in the coalition governing Poland at the time the BIA took official notice of the changed political circumstances in Poland. The implication is that those with direct responsibility for maintaining public order in Poland were still likely to persecute Solidarity members. This argument, however, is without support in the record, and absent such support we decline to give it much weight. We further take judicial notice of the fact that the Communist Party is no longer a member of the government in power in Poland, and that Solidarity's long-time leader, Lech Walesa is now Poland's president.[4] Under these circumstances, we do not believe the BIA erred in considering the proposition that Solidarity members currently face a relatively insignificant risk of persecution in Poland to be "commonly acknowledged."

That is not to say that the Board may blindly apply this recognized fact to deny automatically every asylum application submitted by a Polish alien. The use of official notice does not substitute for an analysis of the facts of each applicant's individual circumstances. Uncontroverted facts may be inapplicable to or of limited probative value

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[4] We exercise here our discretion to take judicial notice of further changes in Polish politics that occurred between the time of the BIA's decision and our review. *See Zalega*, 916 F.2d at 1266 n.5; *Carvajal-Munoz*, 743 F.2d at 564 n.2.

in individual cases and the Board must remain open to this possibility. The petitioners are therefore right to demand that the BIA engage in a careful, individualized review of the evidence presented in their applications and hearings. The applicants' argument that the Board failed to so in their cases, however, is without merit. We note that agency action is entitled to a presumption of regularity, *Citizens of Overton Park v. Volpe*, 401 U.S. 402, 415 (1971), and thus the burden is on the petitioners to convince us that the BIA gave short shrift to the evidence they presented. *See McLeod v. INS*, 802 F.2d 89, 95 n.8 (3rd Cir. 1986). Our review of the record and the Board's decisions suggests no reason to overturn this presumption; it appears that the Board did indeed give adequate consideration to the petitioners' evidentiary presentations and that its findings that the petitioners do not harbor well-founded fears of persecution are supported by substantial evidence.[5]

The petitioners' second and more challenging claim is that the Board violated their due process rights by not affording them an opportunity to rebut the facts of which it took official notice. This claim has both statutory and constitutional dimensions. As a statutory matter, the INA does not expressly entitle asylum petitioners to rebut noticed facts. The petitioners argue, however, that § 556(e) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 556(e), mandates that the BIA allow them such an opportunity. Section 556 provides that "[w]hen an agency decision rests on official notice . . . a party is entitled,

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[5] In an *amicus curiae* brief filed in this appeal, the Polish American Congress and the National Advocates Society argue that the petitioners have proven statutory eligibility for asylum based on the past persecution to which they have each been subjected. The petitioners themselves do not raise this argument on appeal. We will reach issues raised solely by *amicus* filings in our discretion, *National Comm. on Egg Nutrition v. FTC*, 570 F.2d 157, 160 (7th Cir.), *cert. denied*, 439 U.S. 821 (1978), and we decline to exercise that discretion in this case.

upon timely request, to an opportunity to show the contrary." This argument is misplaced, for the APA is not applicable to deportation proceedings under the INA. Congress has directed that the procedures designated in the INA are the "sole and exclusive" procedures governing deportation hearings. 8 U.S.C. § 1252(b); *see also Marcello v. Bonds*, 349 U.S. 302, 310 (1955) ("[W]e cannot ignore . . . the direction in the statute that the methods therein prescribed shall be the sole and exclusive procedure for deportation proceedings. Unless we are to require Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act, we must hold that the present statute expressly supersedes the hearing provisions of that Act."). Because asylum proceedings initiated in the context of the deportation process are considered part and parcel of that process, *see Kashani v. Nelson*, 793 F.2d 818, 821 (7th Cir.), *cert. denied*, 479 U.S. 1006 (1986), *Carvajal-Munoz*, 743 F.2d at 567, the APA's procedural entitlements are not applicable to the proceedings before us.[6]

We turn, then, to the constitutional component of the petitioners' argument, which is that the BIA violated their fifth amendment due process rights by not allowing them an opportunity to rebut the noticed facts. It is well established that aliens are entitled as a constitutional matter to what has come to be known as a "meaningful opportunity to be heard," *Matthews v. Eldridge*, 424 U.S. 319, 348 (1976), in deportation proceedings. This proposition can be traced back to the elder Justice Harlan's opinion in *The Japanese Immigrant Case*, 189 U.S. 86, 101 (1902):

> [The executive may not] cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population . . . to be taken into custody and deported without giving him all opportunity to be heard upon the ques-

[6] We note that the Third Circuit, without explicitly deciding, has assumed to the contrary. *See McLeod v. INS*, 802 F.2d at 94 (applying § 556(e) of the APA to asylum proceedings).

> tions involving his right to be and remain in the United States.

See also Johnson v. Eisentragen, 339 U.S. 763, 771 (1950); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-51 (1950); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597 n.6 (1953); *Haitian Refugee Center v. Nelson*, 872 F.2d 1555, 1562-63 (11th Cir.), *aff'd in part sub nom., McNary v. Haitian Refugee Center*, 111 S. Ct. 888 (1991); *Maldonado-Perez v. INS*, 865 F.2d 328, 332 (D.C. Cir. 1989); *Ramirez v. INS*, 550 F.2d 560, 563 (9th Cir. 1977) (quoting *Bilokumsky v. Tod*, 263 U.S. 149, 157 (1923) (Brandeis, J.)).

The question, of course, is what constitutes a meaningful opportunity to be heard when the Board takes official notice of commonly acknowledged facts. "The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him *and the opportunity to meet it.*' " *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-72 (1950) (Frankfurter, J., concurring)) (emphasis added). An individual's opportunity to meet the case made against him is crucial: not only do such opportunities serve an important truth-seeking function, but they "generat[e] the feeling, so important to a popular government, that justice has been done." *McGrath*, 341 U.S. at 172. We believe the due process clause of the fifth amendment requires that petitioners be allowed an opportunity to rebut officially noticed facts, particularly when, as in this case, those facts are crucial to—indeed dispositive of—the outcome of the administrative proceeding. When courts allow agencies, as we do, "wide latitude in taking official notice . . . it is essential that the parties be afforded an opportunity to present information 'which might bear upon the propriety of noticing the fact, or upon the truth of the matter to be noticed.' "[7] *Banks*

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[7] *Cf. Report of the Attorney General's Committee on Administrative Procedures in Government Agencies* 71-73 (1941) (cited in 4 J. Stein, ADMINISTRATIVE LAW, § 25.01 n.7 (1986)):

(Footnote continued on following page)

v. Schweiker, 654 F.2d 637, 641 (9th Cir. 1981) (quoting C. McCormick, LAW OF EVIDENCE § 333 at 771 (2d ed. 1972)). *See also Carson Products Co. v. Califano*, 594 F.2d 453, 459 (5th Cir. 1979) ("It is a fundamental proposition of administrative law that interested parties must have an effective chance to respond to crucial facts."). Such fairness concerns appear to have motivated the drafters of Federal Rule of Evidence 201(e), which provides litigants in federal court with just such an opportunity to rebut judicially noticed facts. *See* Fed. R. Evid. 201, Notes of Advisory Committee on 1972 Proposed Rules ("Basic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking notice"). We note, finally, that *not* to allow petitioners an opportunity to rebut noticed facts would sanction the creation of an unregulated back door through which unrebuttable, non-record evidence could be introduced against asylum petitioners outside of the statutorily-mandated hearing context, *see* 8 U.S.C. § 1252(b).

Having come to this conclusion, we need not, however, mandate that the BIA institute new procedures to accommodate our ruling, for its existing procedural framework provides asylum petitioners with a mechanism to rebut officially noticed facts. Although it does not explicitly make reference to official notice, 8 C.F.R. § 3.2 provides that an asylum applicant may petition the Board to reopen her case to present new evidence between the time the BIA renders a decision and the time she is directed to

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[7] *continued*

> [A] noticed fact . . . may actually be wrong. Or, as is far more likely . . . there may be room for reasonable disagreement concerning the significance of the facts which are noticed, and the deductions to be drawn from them. . . .
>
> The parties, then, are entitled to be apprised of the data upon which the agency is acting. They are entitled not only to refute but, what in this situation is usually more important, to supplement, explain, and give different perspective to the facts upon which the agency relies.

depart the United States.[8] *See Chavarria v. U.S. Dept. of Justice*, 722 F.2d 666, 669 (11th Cir. 1984). This mechanism provides asylum applicants with an opportunity to present the Board with evidence that the facts it officially noticed are incorrect or that they are true but irrelevant to their case. Presumably, where the motion to reopen presents evidence sufficient to call into question the Board's decision, the Board would then reopen the asylum proceeding to allow for a more extensive inquiry into the disputed facts.[9] Petitioners may appeal the Board's denial of such motions to this court. *See INS v. Abudu*, 485 U.S. 94 (1988); *Dokic v. INS*, 899 F.2d 530, 532 (6th Cir. 1990); *Roque-Carranza v. INS*, 778 F.2d 1373, 1374 (9th Cir. 1985). Judicial review of motions to reopen, though governed by an admittedly deferential abuse of discretion standard, *see Abudu*, 485 U.S. at 107, will ensure that Board decisions to take official notice in the face of petitioners' protests do not deprive them of their rights to fundamentally fair asylum proceedings. We therefore hold that the motion to reopen procedure allows asylum petitioners an opportunity to introduce evidence rebutting officially noticed facts which is sufficient to satisfy the requirements of the fifth amendment's due process clause.

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[8] 8 CFR § 3.2 provides in part:

> Reopening or reconsideration of any case in which a decision has been made by the Board [may be requested] by the party affected by the decision . . . . Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. . . .

[9] We note that the filing of a motion to reopen does not serve to stay the execution of Board rulings. *See* 8 CFR § 3.8(a). There thus exists the possibility that unsuccessful asylum applicants may be ordered to leave the country before the Board has ruled on their motions to reopen. We presume that when an asylum applicant uses a good faith motion to reopen to dispute officially noticed facts, the Board will exercise its discretion to stay the execution of its decision until it has had an opportunity to rule on the applicant's motion.

The petitioners in the cases before us did not file motions to reopen, nor did they request from the BIA any other opportunity to respond to the noticed facts at issue. They do not argue that their failure to do so should be excused. Even if the petitioners had filed motions to reopen, the Board would have surely—and properly—denied them, as they have failed to identify any significant evidence which calls into question the correctness of the Board's notice. We therefore find the petitioners' challenges to the Board's decisions to be without merit, and affirm the Board's denial of their asylum applications.

C. Voluntary Departure

Because we affirm the BIA's decision that the petitioners are ineligible for political asylum, we must address their request that this court reinstate each petitioner's period of voluntary departure for an additional 60 days. The petitioners contend that our review of BIA asylum decisions necessarily includes the power to extend a grant of voluntary departure so that the period begins on the date when this court's decision becomes effective. They contend that the refusal to suspend the running of the period of voluntary departure pending judicial review of Board decisions will deter asylum applicants from pursuing their statutory right to appellate review of BIA asylum determinations.

By statute, only the Attorney General and his designee possess the authority to grant voluntary departure. 8 U.S.C. §§ 1252(b), 1254(e). Voluntary departure affords deportable aliens significant advantages by permitting them to depart for any country willing to accept them and reenter the United States once they have obtained the proper documentation. *Contreras-Aragon v. INS*, 852 F.2d 1088, 1090 (9th Cir. 1988) (*en banc*). By contrast, aliens who are deported face greater restrictions on their ability to reenter the United States as well as potential criminal penalties for failing to comply with those restrictions. 8 U.S.C. §§ 1182(a)(17), 1326.

INS regulations allow an alien who has been granted voluntary departure to apply to the district director for an extension of the voluntary departure period. 8 C.F.R. § 244.2. Section 244.2 vests the district director with "sole jurisdiction" to reinstate or extend a grant of voluntary departure, except under certain circumstances not relevant here, and further provides that "no appeal may be taken" from the district director's determination. Thus, while this court has jurisdiction to review the BIA's denial of asylum applications, we lack authority to review the INS's discretionary grant of voluntary departure. *See Farzad v. INS*, 808 F.2d 1071, 1072 (5th Cir. 1987); *Contreras-Aragon v. INS*, 852 F.2d at 1098 (Kozinski, J. dissenting). We are nevertheless concerned that the INS might use its power to grant or withhold voluntary departure to insulate the BIA's asylum decisions from judicial review. Deportable aliens should not be faced with the choice between enjoying the voluntary departure privilege and securing judicial review of Board determinations. *See, e.g., Contreras-Aragon*, 852 F.2d at 1090-1092; *Ballenilla-Gonzalez v. INS*, 546 F.2d 515, 521 (2nd Cir.), *cert. denied*, 434 U.S. 819 (1977). This concern has already led one court of appeals to rule that the INS may not decline to extend the voluntary departure period of an alien pursuing a non-frivolous appeal solely because he has brought such an appeal. *Umanzor-Alvarado v. INS*, 896 F.2d 14, 16 (1st Cir. 1990). Should it come to our attention that the INS is wielding its discretion to withhold voluntary departure to deter applicants from seeking judicial review of BIA decisions, our scrutiny of that discretionary exercise might expand. The cases before us, however, do not present this possibility; the petitioners have not tendered evidence which suggests that the INS has exercised its voluntary departure power in such a troubling fashion. Indeed, it appears that none of the petitioners even sought an extension of their term of voluntary departure pending this court's decision. Their apparent failure to file timely motions for extension can be remedied by filing a motion with the INS district director to *reinstate* voluntary departure. 8 C.F.R. § 244.2. If the petitioners pursue this

procedural avenue, we encourage the INS to consider their requests with care.

III.

For the foregoing reasons, the decisions of the Board of Immigration Appeals in the cases before us are

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: May 31, 1991

BEFORE: Honorable Harlington Wood, Jr., Circuit Judge
Honorable Joel M. Flaum, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge

Nos. 90-1964, 90-2070, 90-2412

MARIUSZ KACZMARCZYK, et al.,
Petitioners

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

Petitions for Review of Three Orders of
the Board of Immigration Appeals,
Nos. A28-474-767, A27-896-113, A27-894-952

These causes were heard on the record from the above mentioned agency, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the decisions of the Board of Immigration Appeals in these causes appealed from be, and the same are hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of
Immigration Appeals

File: A28 474 767 — Chicago Date: APR 6, 1990

In re: MARIUSZ KACZMARCZYK

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Michael A. Grochowiak, Esquire
Doss, Puchalski & Keenan, Ltd.
Suite 1700
20 North Wacker Drive
Chicago, Illinois 60606

ON BEHALF OF SERVICE:

Jennie Giambastiani
General Counsel

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] — Nonimmigrant — remained longer than permitted

APPLICATION: Asylum, withholding of deportation; voluntary departure

This is an appeal from the decision of an immigration judge dated March 15, 1988, which denied the respondent's requests for relief pursuant to sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1253(h), but granted him the privilege of voluntary departure in lieu of deportation. The appeal will be dismissed.

The respondent is a 30-year-old native and citizen of Poland who entered the United States as a nonimmigrant visitor for pleasure on December 24, 1984, but remained longer than permitted. During deportation proceedings the respondent admitted the allegations contained in his Order to Show Cause (Form I-221S) and conceded deportability. We find that deportability has been established by clear, unequivocal, and convincing evidence. *See Woody* v. *INS*, 385 U.S. 276 (1966).

On appeal, the respondent argues that the decision of the immigration judge denying his request for asylum was an abuse of discretion, and that the evidence presented supports his asylum claim.

The respondent's fear of persecution in Poland is based on his activities as a member of a student group sympathetic to the Solidarity organization, and his participation in pro-Solidarity activities in the United States. The Board takes administrative notice that effective September 10, 1989, the Solidarity organization formally entered into the coalition government that is presently governing Poland. Given the fact that Solidarity is now part of the coalition governing Poland, there no longer exists any basis for the respondent's claim that he has a well-founded fear of persecution by the Polish government due to his association with Solidarity. He has therefore failed to establish his eligibility for either asylum or withholding of deportation within the meaning of the Act. *See INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987); *INS* v. *Stevic*, 467 U.S. 407 (1984); *Matter of Mogharabbi*, Interim Decision 3028 (BIA 1987). Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in *Matter of*

Chouliaris, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

/s/ MARY MAGUIRE DUNNE
FOR THE BOARD

APPENDIX D

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of
Immigration Appeals

File: A27 896 113 — Chicago Date: APR 17, 1990

In re: JOZEF CZAJKOWSKI

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Jonah Rosenburg, Esquire
7 South Dearborn, Suite 1607
Chicago, Illinois 60603

ON BEHALF OF SERVICE:

Alexandra Kostich
General Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] — Nonimmigrant — remaining longer than permitted

APPLICATION: Asylum, withholding of deportation

ORDER:

PER CURIAM. In a decision dated February 25, 1988, an immigration judge found the respondent deportable as charged, denied his applications for asylum and withholding of deportation under sections 208(a) and 243(h) of the Immigration and Nationality Act, respectively, 8 U.S.C. §§ 1158(a) and 1253(h), and granted him the privilege of voluntary departure from the United States. The respondent has appealed from that decision. The respondent's request for oral argument is denied and the appeal will be dismissed.

During the deportation proceedings, the respondent admitted the factual allegations contained in the Order to Show Cause (Form I-221S), and conceded his deportability as charged. The Board finds that the respondent's deportability has been established by clear, unequivocal and convincing evidence, as required by *Woodby* v. *INS*, 385 U.S. 276 (1966), and 8 C.F.R. § 242.14(a). The only issue on appeal is whether the immigration judge properly denied the respondent's applications for asylum and withholding of deportation.

The respondent, a 38-year-old native and citizen of Poland, asserts that he faces a risk of persecution if returned to Poland. He contends on appeal that the immigration judge's decision contradicts the evidence presented in his case. However, the Board concludes that he has not established any past persecution and has not satisfied the well-founded fear of persecution standard required for asylum under section 208 of the Act. *See INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987). He has not shown that a reasonable person in his circumstances would fear persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *See Matter of Mogharrabi*, Interim Decision 3028 (BIA 1987).

The respondent primarily bases his claim of a fear of persecution by the Polish authorities on account of his membership and leadership position in the Solidarity trade union. His asylum application indicates he was called to the police station on one occasion, and then released. In his testimony he notes that he was called to the police station on two occasions, once in January of 1982, and once in March of 1982. He was free to leave on each occasion, after a relatively brief inquiry, and was subsequently allowed to work on a contract job in Iraq for two

years. The respondent returned to his place of former employment. He was never again detained or questioned by the police for his Solidarity activities. He says he was at risk of losing his job, and was on an extended leave. After he came to the United States he learned he was terminated from his position. The record also includes a May 7, 1987, advisory opinion from the United States Department of State's Bureau of Human Rights and Humanitarian Affairs ("BHRHA"), as required by 8 C.F.R. § 208.10(b). On the basis of the material before it, the BHRHA expressed its view that the respondent had not established a well-founded fear of persecution if returned to Poland.

The Immigration and Naturalization Service has presented evidence of the legalization of the Solidarity Union in Poland. Moreover, the Board takes administrative notice that effective September 10, 1989, the Solidarity organization formally entered into the coalition government that is presently governing Poland. Given that Solidarity is now part of the coalition governing Poland, there no longer exists any basis for the respondent's claim that he has a well-founded fear of persecution by the Polish government due to his association with Solidarity. *See Matter of Chukumerije*, 15 I&N Dec. 520 (BIA 1975).[1]

Additionally, although past persecution alone may be sufficient to demonstrate statutory eligibility for asylum, *Matter of Chen*, Interim Decision 3104 (BIA 1989), the respondent has not established that he was ever persecuted in the past in Poland on account of his affiliation

[1] The Board may take administrative notice of changed circumstances in appropriate cases, such as where the government from which the threat of persecution arises has been removed from power. *Matter of Chen*, Interim Decision 3104 (BIA 1989).

with Solidarity. He may have been summoned by the authorities on one or possibly two occasions due to his activities on behalf of Solidarity, but neither this fact, nor respondent's complaint that he was terminated from his work rise to the level of persecution. He was fully employed with the same company for fifteen years, and he was not officially terminated until it was clear he had left Poland. His lack of job security in Poland may be attributed to any of several reasons, however, the respondent has not demonstrated, on this record, a degree of deprivation which indicates persecution. The record does not preclude the possibility that his employment insecurity derived from the economic difficulties of the company, or that prevailed in Poland. His wife and children remain safely in Poland.

On appeal, the respondent asserts that the asylum application was erroneously denied by the immigration judge because the evidence establishes he carried his burden of proof. Based on his testimony, and review of the entire record, the Board affirms the findings of the immigration judge. This denial of asylum and withholding is also based on the changed political circumstances in Poland.

Inasmuch as the respondent has failed to satisfy the lower burden of proof required for asylum, it follows that he has also failed to satisfy the clear probability standard of eligibility required for withholding of deportation. *See Matter of Mogharrabi, supra.* The evidence does not establish that it is more likely than not that the respondent would be subject to persecution on account of one of the five grounds specified in section 243(h) of the Act. *See INS* v. *Stevic,* 467 U.S. 407 (1984).

Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

/s/ MARY MAGUIRE DUNNE
FOR THE BOARD

APPENDIX E

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of
Immigration Appeals

File: A27 894 952 — Chicago Date: JUN 6, 1990

In re: TADEUSZ KUSPER

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Jonah Rosenburg, Esquire
7 South Dearborn Street, Suite 1607
Chicago, Illinois 60603

ON BEHALF OF SERVICE:

Debra Gordon
General Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] — Nonimmigrant — remained longer than permitted

APPLICATION: Asylum, withholding of deportation

ORDER:

PER CURIAM. In a decision dated September 28, 1988, an immigration judge found the respondent deportable as charged, denied his applications for asylum and withholding of deportation under sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1253(h) respectively, and granted the respondent voluntary departure. The respondent has appealed that decision. The request for oral argument before the Board is denied. 8 C.F.R. § 3.1(e). The appeal is dismissed.

During the deportation proceedings, the respondent, through counsel, admitted the allegations in the Order to Show Cause and conceded his deportability as an alien who has remained in the United States longer than his nonimmigrant visa permitted. Therefore the Board finds that deportability as charged under section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2), has been established by clear, unequivocal, and convincing evidence. *See Woodby* v. *INS*, 385 U.S. 276 (1966); 8 C.F.R. § 242.14(a). The only issues on appeal concern the respondent's applications for asylum and withholding of deportation.

The respondent is a 38-year-old married male native and citizen of Poland. He argues, through counsel, that he has established a well-founded fear of persecution, should he be returned to Poland. His claim is based on his activities in support of the Solidarity labor organization, both before and after it was outlawed in December 1981.

The respondent testified that he participated in a number of meetings, strikes and demonstrations sponsored by the Solidarity labor organization in Poland. In addition, he distributed Solidarity political literature (Tr. at 25). When the communist authorities declared martial law in 1981, several of the respondent's friends were arrested (Tr. at 13). On May 3, 1982, the respondent himself was arrested and held for 24 hours, after a Constitution Day demonstration (Tr. at 14). Though he was not prevented from returning to work thereafter, he was denied all raises and promotions, while persons who did not participate in Solidarity activities did receive raises and promotions (Tr. at 15, 33). Meanwhile, the respondent and his wife received frequent phone calls from the police, warning the respondent to cease his Solidarity activities, and threatening to commence reprisals (Tr. at 15, 17). The respondent also received a summons to appear at the police

station from time to time in order to "register," apparently as a means for the authorities to keep a close watch on his activities (Tr. at 17). The respondent applied for a passport on several occasions, but was unable to obtain one, until he resorted to unofficial channels. After three years of these efforts, he managed to acquire a passport, and he promptly used it to go to the United States, where he arrived on October 4, 1985 (Tr. at 16, 17). Based on his difficulties with the Polish authorities as discussed above, he has applied for asylum.

We observe that the difficulties which allegedly cause the respondent to fear persecution at the hands of the Polish authorities occurred from approximately 1980 to 1985. The Board takes administrative notice that effective September 10, 1989, the Solidarity organization formally entered into the coalition Government that is presently governing Poland. Given that Solidarity is now part of the coalition governing Poland, there no longer exists any basis for the respondent's claim that he has a well-founded fear of persecution by the Polish Government due to his association with Solidarity. *See Matter of Chukumerije*, 15 I&N Dec. 520 (BIA 1975).[1] Under these circumstances, we do not find that the respondent has demonstrated either a clear probability that his life or freedom would be threatened in Poland on account of his activities in support of Solidarity or that he has a well-founded fear of persecution in Poland for that reason. *See INS* v. *Stevic*, 467 U.S. 407 (1984); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987).

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[1] The Board may take administrative notice of changed circumstances in appropriate cases, such as where the government from which the threat of persecution arises has been removed from power. *Matter of Chen*, Interim Decision 3104 (BIA 1989).

Even if one were to assume that the respondent did experience persecution in Poland, or that at the time he left and for some time thereafter he had a well-founded fear of persecution should he return, it is not established that he presently warrants a grant of asylum. In *Matter of Chen*, Interim Decision 3104 (BIA 1989), we stated that in certain circumstances past persecution alone might warrant a grant of asylum even if there was no reasonable likelihood of present persecution. For instance, asylum could be granted if the past persecution had been so severe that return to the country of persecution would be inhumane. We do not find this to be the case here. Moreover, the record does not disclose any other humanitarian or compelling bases to warrant a grant of asylum under the circumstances of this case where we do not find that a well-founded fear of persecution presently exists were the respondent to return to Poland.

For the foregoing reasons, the appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

/s/ MARY MAGUIRE DUNNE
FOR THE BOARD

Supreme Court, U.S.
FILED
OCT 30 1991
OFFICE OF THE CLERK

(2)

No. 91-365

In the Supreme Court of the United States

OCTOBER TERM, 1991

MARIUSZ KACZMARCZYK, JOZEF CZAJKOWSKI AND TADEUSZ KUSPER, PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals, in adjudicating petitioners' asylum applications, could take administrative notice of the change in government in Poland.

2. Whether the court of appeals had power to grant petitioners voluntary departure.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-365

MARIUSZ KACZMARCZYK, JOZEF CZAJKOWSKI AND TADEUSZ KUSPER, PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-17, is reported at 933 F.2d 588. The opinions of the Board of Immigration Appeals, Pet. App. 19-30, are unreported.

JURISDICTION

The judgment of the court of appeals, Pet. App. 18, was entered on May 31, 1991. The petition for a writ of certiorari was filed on August 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are natives and citizens of Poland. Each petitioner had belonged to or held a leadership position in Solidarity or a group sympathetic to Solidarity. Pet. App. 2-5. After entering the United States as visitors for pleasure, petitioners stayed longer than the period of time authorized by the Immigration and Naturalization Service. *Id.* at 2.

2. In separate hearings before an immigration judge, petitioners conceded deportability under 8 U.S.C. 1251(a)(2); see 8 U.S.C. 1184(a); 8 C.F.R. 214.2(b), and applied for asylum and withholding of deportation. The immigration judge denied petitioners' applications. Pet. App. 2-5.

3. The Board of Immigration Appeals (BIA) affirmed. Pet. App. 19-30. In each case, the BIA took administrative notice that, effective September 10, 1989, the Solidarity organization formally entered into the coalition government currently ruling Poland. *Id.* at 20, 24, 29. The Board reasoned that, with this change in the government of Poland, petitioners do not have a well founded fear of persecution on account of their pro-Solidarity political opinion. *Ibid.*

4. The court of appeals denied the petitions for review. Pet. App. 1-17. It held that "the BIA may take official notice of uncontroverted facts concerning political conditions in asylum seekers' home countries, including Solidarity's role in the Polish government." *Id.* at 8. The court further held that "it was reasonable for the Board to conclude that Poland's changed political circumstances substantially diminished the likelihood that the Polish government would persecute Solidarity members and activists." *Id.* at 8-9. The court rejected petitioners' contention that Section 556(e) of the Administrative Procedure

Act, 5 U.S.C., entitles aliens in deportation hearings to rebut administratively noticed facts, because "the APA is not applicable to deportation proceedings under the [Immigration and Nationality Act]." Pet. App. 11. The court also rejected petitioners' contention that administrative notice of the change in Poland's government rendered their deportation proceedings fundamentally unfair. It explained that petitioners' ability to file a motion to reopen "is sufficient to satisfy the requirements of the fifth amendment's due process clause." *Id.* at 14.

The court of appeals denied petitioners' request to reinstate or extend their periods of voluntary departure. The court held that a grant of voluntary departure is within the sole discretion of the Attorney General and is not subject to judicial review. Pet. App. 16.

ARGUMENT

1. Contrary to petitioners' contentions, neither the Administrative Procedure Act nor the Fifth Amendment's Due Process Clause requires the BIA to give an alien in deportation proceedings notice and an opportunity to rebut an administratively noticed fact.

a. Although the Administrative Procedure Act permits parties to rebut officially noticed facts "when an agency decision rests on official notice of a material fact not appearing in the record," 5 U.S.C. 556(e), it is well settled that the APA does not apply to deportation proceedings. *Marcello* v. *Bonds*, 349 U.S. 302, 310 (1955); accord *Kapcia* v. *INS*, No. 90-9533 (10th Cir. Sept. 9, 1991), slip op. 6; see, *e.g.*, *Escobar* v. *INS*, 935 F.2d 650, 653 (4th Cir. 1991); *Ho Chong Tsao*

v. *INS*, 538 F.2d 667, 669 (5th Cir. 1976), cert. denied, 430 U.S. 906 (1977).[1]

Contrary to petitioners' contention (Pet. 8-9), no court of appeals has held that the APA applies to deportation proceedings. Petitioners rely entirely on the Third Circuit's decision in *McLeod* v. *INS*, 802 F.2d 89 (1986), and the en banc Ninth Circuit's decision in *Escobar Ruiz* v. *INS*, 838 F.2d 1020 (1988). In *McLeod*, the Third Circuit noted the APA's requirement of an opportunity to rebut officially noticed facts and held that that requirement was not violated in that case because the alien "did not request an opportunity to rebut" the fact of a change of government in Grenada. 802 F.2d at 94. Although that analysis presupposes that the APA applies to deportation proceedings, the Third Circuit assumed that premise without deciding the question. See *id.* at 93-94 & n.4. In other decisions, both before and after *McLeod*, the Third Circuit has made clear its view that deportation proceedings are not governed by the APA.

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[1] This Court held in *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955), that an alien may, in some circumstances, collaterally attack a final deportation order in federal district court. That decision was superseded by 8 U.S.C. 1105a(c), which limits judicial review of a final deportation order to a petition for review in the circuit court of appeals. Cf. *Jean* v. *Nelson*, 711 F.2d 1455, 1502-1503 (11th Cir. 1983), aff'd, 472 U.S. 846 (1985). More fundamentally, neither *Pedreiro* nor any other decision of this Court suggests that deportation proceedings are governed by the APA. Because petitioners' applications for asylum and withholding of deportation were made in deportation proceedings, they are "considered part and parcel of that process, *see Kashani* v. *Nelson*, 793 F.2d 818, 821 (7th Cir.), *cert. denied*, 479 U.S. 1006 (1986), *Carvajal-Munoz* [v. *INS*], 743 F.2d 562, 567 [(7th Cir. 1984)], [and] the APA's procedural entitlements are not applicable." Pet. App. 11.

Clarke v. *INS*, 904 F.2d 172, 174 (1990); *Giambanco* v. *INS*, 531 F.2d 141, 144-145 (1976).

In *Escobar Ruiz*, the Ninth Circuit held, for purposes of awarding attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A) and (d)(3), that a deportation proceeding is "an adjudication under section 554" of Title 5, or the APA. 5 U.S.C. 504(b)(1)(C). In reaching that result, however, the Ninth Circuit reasoned that an adjudication "under" the APA is one conducted in conformity to the APA. 838 F.2d at 1023. It recognized that if "under" meant "subject to" the APA, this Court's decision in *Marcello* might require a different result. 838 F.2d at 1025.[2]

b. Contrary to petitioners' contention (Pet. 10-12), the BIA's administrative notice of the change of government in Poland did not violate the Fifth Amendment's Due Process Clause. The court of appeals recognized that petitioners were entitled to "a 'meaningful opportunity to be heard,' *Mathews* v. *Eldridge*, 424 U.S. 319, 348 (1976)," Pet. App. 11, but held that the BIA's "existing procedural framework provides asylum petitioners with a mechanism to rebut officially noticed facts," *id.* at 13. Accordingly, if petitioners had evidence that Poland's government had not changed, or that they still harbored a well-founded fear of persecution despite the change, they could have filed a motion to reopen their deportation proceedings or reconsider the orders of deportation. See 8 C.F.R. 3.2, 3.8; *INS* v. *Abudu*, 485 U.S. 94 (1988). The court of appeals found that "[t]his mechanism

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[2] Since the judgment below is correct regardless of this Court's decision on the applicability of EAJA to deportation proceedings, this case should not be held for *Ardestani* v. *INS*, No. 90-1141 (argued Oct. 8, 1991).

provides asylum applicants with an opportunity to present the Board with evidence that the facts it officially noticed are incorrect or that they are true but irrelevant to their case." Pet. App. 14.

Petitioners contend (Pet. 11-12) that motions to reopen or reconsider might not provide due process in cases in which the INS schedules immediate deportation, or in which the grounds for reopening might not compel this exercise of discretionary relief. But petitioners must assert their own due process rights, they "cannot rest a claim to relief premised on the legal rights or interests of third parties." *Powers* v. *Ohio*, 111 S. Ct. 1364, 1370 (1991); see *Mohsseni Behbahani* v. *INS*, 796 F.2d 249, 251 (9th Cir. 1986); *Vides-Vides* v. *INS*, 783 F.2d 1463, 1469 (9th Cir. 1986); *Figeroa* v. *INS*, 886 F.2d 76, 78 (4th Cir. 1989); *Ka Fung Chan* v. *INS*, 634 F.2d 248, 258 (5th Cir. 1981); *Nicholas* v. *INS*, 590 F.2d 802, 809 (9th Cir. 1979). Petitioners have had ample time to rebut the BIA's administrative notice of the ascendance of Solidarity to the status of coalition partner in Poland, and have neither disputed that fact nor the irresistible inference that Solidarity sympathizers are not subject to persecution on account of political opinion in Poland.[3]

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[3] Although petitioners protest (Pet. 9-10) the BIA's inference that Solidarity's assumption of power undercut any objective basis for petitioners' fear of persecution, the court of appeals agreed that "it was reasonable for the Board to conclude that Poland's changed political circumstances substantially diminished the likelihood that the Polish government would persecute Solidarity members and activists." Pet. App. 8-9. It is well settled that an agency's administrative notice necessarily includes the drawing of inferences based on the agency's "common sense as much as its expertise." *NLRB* v. *Milk Drivers & Dairy Employees, Local 338*, 531 F.2d 1162, 1166 (2d Cir. 1976); *Kapcia* v. *INS*, slip op. 5. Those inferences must be

2. Petitioners contend (Pet. 12) that the court of appeals should have reinstated their period of voluntary departure, and that its refusal to do so will "chill" the filing of petitions for review.

Congress gave the Attorney General sole authority to grant voluntary departure. Section 244(e) of the Immigration and Nationality Act, 8 U.S.C. 1254(e), provides that "the Attorney General may, in his discretion, permit any alien under deportation proceedings * * * to depart voluntarily." The statute thus excludes the judiciary from reinstating voluntary departure. Cf. *INS* v. *Hector*, 479 U.S. 85, 88-90 (1986) (per curiam); *INS* v. *Phinpathya*, 464 U.S. 183, 194 (1984).

In any event, petitioners have received from the district director the administrative relief they sought and failed to obtain from the court of appeals. The District Director for the INS Chicago district office has granted petitioners the privilege of voluntarily departing the United States on or before January 15, 1992. Thus, if the Court denies the petition for a writ of certiorari before January 15, 1992, petitioners can voluntarily depart from the United States.

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upheld if they are "reasonable," rather than "hypothetical" or "remote from the realities of * * * existence." *NLRB* v. *Milk Drivers & Dairy Employees*, 531 F.2d at 1165; *Kapcia* v. *INS*, slip op. 6. "If the inference is supported by substantial evidence, it cannot be set aside even though the court could draw a different inference." *Adolph Coors Co.* v. *FTC*, 497 F.2d 1178, 1184 (10th Cir. 1974), cert. denied, 419 U.S. 1105 (1975). Cf. *McLamore* v. *Weinberger*, 538 F.2d 572, 575 (4th Cir. 1976) (agency's decision is supported by substantial evidence when it is within common knowledge and experience of ordinary person).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1991

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